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Article

## Views of the Child Reports: Hearing Directly from Children Involved in Post-Separation Disputes

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### Abstract

Views of the Child reports are being increasingly used in Canada and other countries as a means of directly obtaining the child's perspective on disputes between their parents and/or guardians. The reports provide information about the child's perspective based on one or more interviews with a social worker. Yet, little research exists about their use and impact, the benefits and limitations of the approach, and less about what factors need to be considered in establishing practices and protocols to safely advance children's views before the court. This article draws on the direct experiences of 24 children between the ages of 6–17 years about their views and preferences during family breakdown. The children describe how they wanted to speak to someone about their views and preferences, raised questions about the accuracy of the reporting of their views, the need for protecting their confidentiality by having a say of what is included in the report, and their support for children's participation in decision-making post-separation. Practice, research and policy considerations are also highlighted in order for children's participation to be truly meaningful to them, their parents and the courts.

### Keywords

child custody; children; dispute; divorce; family; participation; rights; separation; Views of the Child

### Issue

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### 1. Introduction

There is growing recognition of the importance of having children participate in post-separation decision-making. The *United Nations Convention on the Rights of the Child* (CRC, Article 12) places an obligation on decision-makers to take children's views into account. Article 12(1) of the CRC recognizes the right of children capable of forming views to express those views in all matters affecting them, and directs that due weight be accorded those views, depending on the age and maturity of the child as well as the matter at issue. Article 12(2) provides for the right of the child to be heard directly or indirectly through a representative in any administrative or judicial proceeding affecting the child. Article 12 is particularly important as it is one of the few provisions of the

CRC that children can exercise themselves, and because it provides for children's involvement in decision-making that most directly impacts on their lives.<sup>1</sup>

Social science research demonstrates that children's participation in decision-making can reduce the negative effects on them during family breakdown (Cashmore, 2003; Smart, 2002; Smith, Gollop, & Taylor, 2000). Yet, ascertaining how to obtain children's views and the weight it should be given has been subject of much scholarly debate (Emery, 2003; Pryor & Rodgers, 2001; Smith, Taylor, & Tapp, 2003; Tisdall, Bray, & Marshall, 2004; Warshak, 2003).

There are several ways of engaging children in the family justice process and one size does not fit all. Some children may need to express themselves through different support mechanisms while other children may not

<sup>1</sup> United Nations Committee on the Rights of the Child (2009). Also, see the Honorable (Retired) Justice Donna Martinson (*G. (B.J.) v. G. (D.L.)*, 2010) involving a 12-year old boy, where she concluded that pursuant to both the Convention on the Rights of the Child and Canada's own domestic laws, “all children in Canada have legal rights to be heard in all matters affecting them” (para. 3). She goes on to cite some of the relevant social science research, and observes, “not hearing from them [children] can have short and long term adverse consequences for them” (para. 6).

need or want to talk to any family justice professionals (Cashmore & Parkinson, 2008; Neale & Smart, 1998).

Generally, children's views and preferences can be expressed through their parents, a child's testimony in court or a video, an appointment of child's counsel, a child custody and access assessment, a letter or affidavit from the child, through child-inclusive mediation, a judicial interview with the child, or with a Views of the Child report (Birnbaum, 2009; Birnbaum & Bala, 2009, 2010; Birnbaum, Bala, & Boyd, 2016; Birnbaum, Bala, & Cyr, 2011; Cashmore & Parkinson, 2008; Focus Consultants, 2007; McIntosh, Wells, Smyth, & Long, 2008; Morag, Rivkin, & Sorek, 2012; Parkinson & Cashmore, 2007; Parkinson, Cashmore, & Single, 2007). While there is no "best way" to hear from children during times of parental separation and each approach has its own strengths and limitations, the author argues that all children involved in any family justice dispute between their parents must be heard in a manner they are comfortable with and feel safe when expressing their views and preferences.

This article focuses on the Views of the Child reports<sup>2</sup> that are being increasingly used in Canada and other countries<sup>3</sup> as a means of obtaining children's perspectives on disputes between their parents and/or guardians to advance their rights as required by the CRC. The Views of the Child reports are based on one or more interviews with a child, but unlike a child custody and access assessment, they do not purport to provide opinions or parenting recommendations. They only provide the child's perspective about their views and preferences as reported to a social worker.

Unlike the social science literature and research on child custody and access assessments (Association of Family and Conciliation Courts, 2006; Birnbaum, Fidler, & Kavassalis, 2008; Galatzer-Levy, Kraus, & Galatzer-Levy, 2009; Melton, Petrila, Poythress, & Slobogin, 2007), child-inclusive mediation (Ballard, Holtzworth-Munroe, Applegate, D'Onofrio, & Bates, 2013; McIntosh, 2007), child legal representation (Birnbaum & Bala, 2009), or children being able to speak with a judge (Birnbaum et al., 2011; Morag et al., 2012; Parkinson et al., 2007), there has been very little research about the value, effectiveness, and impact of the Views of the Child reports (Birnbaum et al., 2016; Focus Consultants, 2007; Williams, 2006). As a response to this gap in knowledge and as part of a larger collaborative practice and

research initiative that includes the Office of the Children's Lawyer<sup>4</sup> and the Ontario Court of Justice and Superior Court of Justice<sup>5</sup> examining the utility of these reports from multiple perspectives (e.g., interviews with children, each of their parents, the parents' lawyers, social workers, and judges), this study draws solely on the direct experiences of 24 children between the ages of 6–17 years about their views and experiences with the Views of the Child reports.

The first section describes the methodology, objectives, and the themes generated by the children using a semi-structured interview guide asking each child the following open-ended questions: (1) can you tell me about whether you wanted to speak to a social worker about your parents' separation? (probe: did either parent say you had to go and talk to this person?); (2) can you tell me about whether you felt comfortable or not in talking with the social worker? (probe: did the social worker say things that allowed you to share your feelings and thoughts); (3) can you tell me about whether you were comfortable in the information you gave and reviewed before a report went to your parents and the judge (probe: any concerns how either parent would feel about what you said; the accuracy of information?); (4) can you tell me when you finished your interview, whether you had anything more you wanted to say or add to your views? (probe: did you have anything else you wanted to say hours or days later); and (5) can you tell me if you have anything else you want to share with me about your experience and whether this type of approach might be helpful to other children in similar circumstances? The next section is a discussion of the lessons learned from children using this approach as well as the limitations of the research. The final section concludes with practice, research and policy implications about these reports if they are to be used as another means of advancing children's participation post-separation. The author argues that the Views of the Child reports should be used as another tool in the family justice toolbox of obtaining children's views and preferences that supports their rights to be heard.

## 2. Methodology and Objectives

The pilot project began in five different Ontario court jurisdictions<sup>6</sup> in May 2016. Each parent, their lawyer and judge was provided with a one-page information

<sup>2</sup> Different provinces use different language when discussing this method. In British Columbia, the reports are called "Hear the Child Reports" and both lawyers and mental health professionals provide them on a private fee-for service basis. In New Brunswick and Nova Scotia they are called "Voice of the Child Report" and in Manitoba they are called "Brief Consultation Services". Also, Birnbaum et al. (2016) provide the results of an online survey of lawyers and mental health clinicians about their experiences with these reports as well as a review of Canadian caselaw about what judges report regarding the utility of these reports.

<sup>3</sup> In Australia, there is a significant body of research about child-inclusive and child-focused mediation (McIntosh et al., 2008); in England and Wales, the "voice of the child" in mediation is being promoted by the government of the United Kingdom (Ministry of Justice, 2015); and in the Netherlands, children's views must be reflected in all parenting plans placed before the court.

<sup>4</sup> An independent law office in the Ministry of Attorney General, Toronto, Ontario, Canada. The Office represents children's interests in child custody and access disputes, child protection matters, and estate matters.

<sup>5</sup> One major distinction between these two levels of court is that the Superior Court of Justice deals with divorce and property matters and the Ontario Court of Justice does not.

<sup>6</sup> These court jurisdictions were selected as they comprised both levels of court, had the highest number of family law disputes in Ontario and serviced both rural and urban populations across northern and southern Ontario.

sheet that summarized what the process was about. Any parent (or their lawyer, if represented) could request a Views of the Child report in a child custody and access dispute before the court. The inclusion/exclusion criteria were that the child should be 7 years of age and older, and the family could understand and speak English. In addition, disputes that involved criminal charges against one parent or the other, and where the child may have to testify, or where a child custody and access assessment had recently been completed, were excluded.

Each parent who consented was requested to complete a one-page intake summary describing their perspective on the issues in dispute. The judge could also provide comments in the court order about what information they were seeking from the report. The issues before the court that could be considered in making an order included, but were not limited, to the following: (1) parents lack the financial means of obtaining an independent child custody and access assessment of their child's views/wishes; (2) obtaining a child custody assessment would create unreasonable delay; and (3) where an independent report of the children's views and preferences is needed but not otherwise available for school, extra-curricular activities, residential schedules, relocation or other issues related to custody and access decision-making.

The social workers who interviewed the children and completed the reports attended a half-day training either in-person or by web-cast about the process, expectations, and the administration of the pilot.<sup>7</sup> They all had to have five years of experience interviewing children and prior experience with child custody and access assessments.<sup>8</sup> Each parent brought the children to the social worker's office for a separate interview of approximately one hour in length. Each child was given the op-

portunity to review the contents of the report before it was released to their parents and the judge. In addition, each social worker also obtained voluntary research consents from each parent and their children for telephone follow-up interview.<sup>9</sup> The children's research interviews were approximately 15–20 minutes in length, audio-recorded and transcribed verbatim for open, axial, and selective coding as recommended in qualitative data analyses (Strauss & Corbin, 1998).<sup>10</sup>

A total of 55 children had a Views of the Child Report completed. There were four children not brought to the social worker for the court ordered interview and the cases were closed. For the research follow-up interviews, one child declined to be interviewed, three children did not sign the consent form,<sup>11</sup> one parent declined to have their child interviewed even though the child signed the consent, the parents of 19 children did not sign the voluntary research consents on behalf of their children or did not return telephone calls, and five parents could not be located at the telephone numbers provided.

### 2.1. Thematic Results

There were 24 children (44%) interviewed between the ages of 6–17 years<sup>12</sup> (15 girls and 9 boys). The children's average age was 12 years old. The most common issue in dispute was visitation arrangements with eight children who had not seen the other parent between six months to two years. Themes that emerged from the children are highlighted below providing both supporting and contrasting views of talking to a social worker about their direct experiences with the Views of the Child reports.

(1) Can you tell me about whether you wanted to speak to a social worker about your parents' separation?

<sup>7</sup> The author (lead researcher), two lawyers representing the two Chief Justices' Offices, the legal director of the Office of the Children's Lawyer and a law professor provided the training. The Office of the Children's Lawyer provided the assignment of cases, the supervision, and the administration of the pilot. The only contact the author had after the cases were closed related solely to the research follow-up interviews with the different participants (e.g., social workers, children, parents, parents' lawyers, and judges) to hear their views and experiences with the Views of the Child reports.

<sup>8</sup> The social workers were all fee-for-service agents of the Office of the Children's Lawyer who conduct clinical investigations and reports pursuant to s.112 of the *Courts of Justice Act*. They were purposely selected for this pilot as they all had already been vetted for their clinical experience in conducting assessments and educational qualifications. More significantly the family law lawyers and the courts were already familiar with the work of the Office of the Children's Lawyer.

<sup>9</sup> The research was approved by the ethics committee at King's University College, Western. While both parents voluntarily signed consents for their children to be interviewed, only those parents who had decision-making about their children were interviewed. In addition, each child had to sign their own consent for the follow-up interview. A research assistant contacted each parent to confirm that they were still interested in allowing their children to be interviewed and the author then followed up with the research interview. The author confirmed with each parent before about the private and confidential nature of the interview and thanked them after for allowing their child to be interviewed. The brief conversation with each parent after allowed the author to check whether the parent was nearby and listening as well as provide assurance to each parent that their children were doing well. No child had to be referred to a child protection agency due to concerns expressed during the research interview or needed to be provided with names of a counsellor for a clinical follow-up.

<sup>10</sup> A qualitative methodology was used because it captures the breadth and depth of children's views and experiences. More importantly, qualitative research draws out the complexities and tensions that are inherent in interviewing children during parental separation, but also supports a more respectful approach to children's voices being heard on matters that affect them directly.

<sup>11</sup> Two children were referred to a child welfare agency because they expressed maltreatment during their clinical interview, one lawyer filed an 'objection' to the report as his client (the father) did not bring the child to the interview, and there were 2 cases where the social workers expressed concern about the child's situation and suggested a referral for a child custody and access assessment. In 4 cases, the social workers did not believe the child understood the meaning of consent for research purposes and the child did not sign the consent form. In one case, a child wrote "rocks on" on their consent form. It is interesting to note that many children who are interviewed for clinical purposes are rarely asked to consent to the interview. See Carroll-Lind, Chapman, Gregory and Maxwell (2006), Coyne (2010), and Williamson, Goodenough, Kent and Ashcroft (2005) for a discussion of children's participatory rights and confidentiality for research purposes.

<sup>12</sup> The author learned during the follow-up research interviews that a child under 7 years of age was interviewed as her older sibling was being interviewed.

The majority of the children wanted to speak to someone about their views and preferences and make them directly known to the decision-maker. For example, one 15-year old girl stated:

like, cause um, me and my brother, we've had a lot of social workers and lawyers and stuff, but none of them actually wanted to talk to us, they just wanted to talk to our parents, so I thought it was nice that they wanted to know our point of view.

Some children expressed initial caution about talking to a social worker about their feelings. One 12-year old boy stated, "first of all, I was kinda sketchy [sic] but then I got more comfortable with the idea". Three siblings (boys, ages 14 and 16, and girl, age 13) expressed different views about whether they wanted to speak to someone. The 16-year old stated:

at first, I thought going would be an annoying problem, but then I saw that if I did go then things could um, I could change what my mother wanted....So I wanted to speak up about that. So I didn't find it a huge pain, but found it a slight bit annoying as I had other plans, but they were cancelled for it....But I was ok with going.

His younger brother said, "no, I didn't want to go, but I was fine going there [social worker's office]". Their sister reported, "I did want to go, so I could like, I could um, express how I feel about it [dispute]". Another 10-year boy old expressed, "yeah, it was a good idea to talk to someone and have them ask me questions". Another 13-year old boy expressed concern about being heard by the decision-maker: "I did like going but I'm just saying that the judges probably won't read the report she wrote up".

(2) Can you tell me if whether you felt comfortable or not in talking to the social worker?

The majority of the children expressed that the social worker made them feel comfortable during the interview. One 12-year old boy commented, "it all seemed very sound and was not overly professional.....Comfortable and not pressured". Another 13-year old boy stated, "I was comfortable in her office to talk"; while a 16-year old boy stated, "I answered most questions fine, nothing took me off guard or anything", while another 14-year old girl stated, "really fine and comfortable....Had a great social worker".

In contrast, a 12-year old girl reported, "I was fine with her but didn't like to talk to people about the issue [her parents break-up]" and another 10-year old boy stated, "I was comfortable except she said some pretty difficult questions for me to answer so I really didn't answer all of them".

(3) Can you tell me whether you were comfortable in going over your information before a report went to your parents and the judge?

The majority of the children believed that the social worker accurately reported what they said. One 12-year old boy stated, "there was no interpretation of what I said but only what I said....It was good"; another 7-year old boy commented that, "the report was accurate" and a 13-year old boy reported, "I actually thought she did a pretty good job, cause she pretty much got everything into the report".

In contrast, four children raised questions about the accuracy of what the social worker wrote about their information. In one case, a 13-year old girl reported that the social worker did not go over the report with her as she [social worker] did not have time.<sup>13</sup> As a result, the report went to her parents and the court without her [13-year old] knowing what the social worker wrote about her information in the report. The girl commented, "things I said were not how I put it". Another 12-year old girl commented, "she got a lot of things wrong like how many times I wanted to see my dad...how I have everything at my dad's place and nothing at my mom's when its actually vice versa". Her 10-year old brother said, "it looked like she [social worker] made some mistakes after we were done, cuz [sic] I said that I wanted to live with my mom but it said on paper that I want to live with my dad".

(4) Can you tell me when you finished your interview, whether you had anything more you wanted to say or add to your views?

It was interesting to hear from the children many weeks later that they did not have anything further to add or say after their initial interviews with the social worker. One 10-year old boy stated, "I said everything I wanted to", another 10-year old girl reported, "I said what I wanted to", and a 16-year old boy stated, "no, I answered what I thought and that's what I stuck with". In contrast, there was only one 12-year old girl who commented, "I didn't know if I wanted to say more or not". The final question posed to the children elicited the following comments.

(5) Can you tell me if there is anything more you want to share with me about your experience and whether it might be helpful to other children in similar circumstances?

The majority of the children were very appreciative of speaking to a social worker about their views and preferences and would recommend the process to other children in similar circumstances. A 10-year old boy reported:

if you tell somebody like her [social worker] then you will, it's kind of like you have a whole load of words in your head and you are going to fall down. But if

<sup>13</sup> In this case, during the mother's interview she reported that the social worker did try and telephone to review the report with her daughter, but her [parent] telephone was disconnected at the time.



you talk to somebody, the weight is going off and you feel relaxed.

Two siblings, a 13-year old boy commented, "I know this is important", and his 16-year old brother stated, "I didn't have a problem with it, so ya". While another 15-year old girl stated, "I was ok with it cuz(sic) I thought it [talking to social worker] would be helpful and to others". She added, "um probably just that you have to be honest about what you actually want and not what you think other people want for you". In another case, a 16-year old boy reported:

"I don't think anything was going to happen [in relation to what he told the social worker] but then my dad read it and got mad I guess because he claimed I lied.....I am still glad I said what I said.

Of the four children who reported that the social worker got their information wrong they still reported that they had a positive experience speaking about their views and preferences and would recommend other children speak to someone as well. Of these children, one 13-year old girl stated, "this helps a lot to figure out what you want" and another 12-year old girl stated, "it is a good idea, possibly depends on the person, for me I was not scared but certain kids could be scared or shy to voice an opinion".

### 3. Discussion and Limitations

Clearly the children were comfortable with and wanted to speak to a social worker about their views and preferences and did not need to add or change anything to their stories when interviewed weeks and months later about it. Children do have the capacity to express their views and opinions thoughtfully and reliably. Yet, caution should be exercised as not all children want to speak about their experiences to family justice professionals and caution must always be exercised regarding children's safety after their views are known.

There were six children interviewed that had not seen their other parent between six months to two years and subsequently were brought to both interviews by the same parent. While it is important to hear from all children no matter their age, some children may have a more difficult time responding as they do not have the longer history of a relationship with their other parent or an understanding of the parental circumstances. In addition, some children's views and preferences may also be colored by their loyalty to the parent they live with and/or being told negative stories about their other parent.<sup>14</sup>

While most children confirmed that their information was being accurately reported to the decision-maker,

some children raised questions about the accuracy of the reporting of their information. While this is concerning particularly when the information is solely about their views and preferences it is important to note that the research interviews were completed over the telephone because of the geographic distances involved and when the children could be available for the follow-up interviews. While every effort was made for the children to be in a private space so that their parent could not hear what they were saying, some parents may have been nearby. That proximity of the parents could have resulted in these children reporting that their information was inaccurate to allow them to save face. In addition, a parenting decision may have also been made based on the children's reports and the parent who did not like the decision may have engaged in discussions with their child about their interview.<sup>15</sup> Therefore, every effort must be made to ensure that children's information is not only reported accurately but that the children feel safe in what they are expressing given that these reports are being read by each of their parents and the judge. This was illustrated by one 16-year old boy who reported that his father called him [the child] a liar because of what he told the social worker.

All these children were articulate and thoughtful in sharing their views and preferences, however, some children may have emotional and cognitive limitations that may negatively impact their ability to express themselves. This can be a concern given that these reports are based on two interviews with the child and no other information (e.g., parents, lawyers, court records) and professional collateral sources (e.g., teachers, doctors) is being collected to provide more context. Moreover, caution also needs to be considered in cases where there is concern about domestic violence in the home. Finally, it was also clear that not all children want to be heard or need to be heard and their wishes must also be respected. From a research perspective, this study provided additional knowledge to the limited body of research about these reports and the absence of children's views and experiences with any family justice professional (Birnbaum & Bala, 2010; Birnbaum et al., 2011; Cashmore, 2003; Cashmore & Parkinson, 2008). Yet, there must also be an awareness of the intrinsic limitations of the Views of the Child reports as they may not reveal the true views and preferences of children who are subject to parental pressure or manipulation, or whose views may be changing. The interviews were limited in number and no additional personal or professional collateral information was obtained that may provide additional context to the children's views and preferences. While the children's interviews provided much insight and support for exploring further research with these types of children's interviews they clearly cannot be generalized to all child cus-

<sup>14</sup> Social workers did report if they observed that the child may be unduly influenced by a parent by quoting the child's exact use of words that may not be related to their age.

<sup>15</sup> There were 36% of the cases that settled as a direct result of the Views of the Child report as reported by either the parents, the parents' lawyers or judges at the time of the follow-up research interviews.

tody and access disputes that may require more in-depth assessments.

#### 4. Conclusions

The Views of the Child reports can be a useful and expeditious way of engaging children in the justice process by allowing their perspectives to be shared with their parents and ultimately to the decision-maker. Further research needs to identify the balancing of potential harm and benefit to children who are invited to speak to professionals about their views and preferences (Birnbaum et al., 2011). Further research also needs to explore the differences in views and preferences of siblings, if any, and how that might impact on children's views and preferences. While this study focused solely on child custody and access disputes, expanding the research to include children who are subject to child welfare proceedings is equally important.

Views of the Child reports do have a place in the continuum of services provided to children and families and can be an effective means of ensuring that children's voices are heard in any family justice disputes. At the very least, hearing from children can provide a triage mechanism to ascertain how the child is adjusting post-separation and whether further referrals are necessary to determine children's best interest. While Views of the Child reports are only one means of providing all children with access to justice they are not meant to replace child legal representation, child-inclusive mediation, child custody and access assessments, or a judicial interview with a child. Rather these reports provide another tool in the family justice toolbox that allows for children's views and preferences to be directly heard and shared with the decision-maker.

More discussion and research follow-up needs to take place between the legal community, mental health professionals, judges, the government and most importantly, children and youth themselves, so that children's participation can be truly meaningful to them, to their parents and to the courts during times of family breakdown.

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#### Conflicts of Interests

The author declares no conflict of interests.

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